MOTION FILED

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No. 98-1172

# In the Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. AND MARVIN GEISNESS,
*Petitioners,*

v.

IRENE HALLIGAN, AS EXECUTRIX OF THE ESTATE OF THEODORE H. HALLIGAN,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Pursuant to Rule 37.3 of the Rules of this Court, the Securities Industry Association ("SIA") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondent to consent to this filing.

The SIA is an association whose members include more than 740 securities firms situated throughout North America. SIA members—including investment banks, broker-dealers, and mutual fund companies—are active in all markets and in all phases of corporate and public finance.

Many SIA member firms use arbitration to resolve a wide range of disputes, including disputes with employees, customers, and other securities firms. The SIA therefore has a compelling interest in preserving the utility of arbitration as a means of resolving disputes without the aid of the courts. Indeed, it is because of this significant interest that the SIA has participated as *amicus curiae* in several notable arbitration cases in which varied aspects of the arbitration process were at issue. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995); *Gilmer v. Interstate/Johnson Corp.,* 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989); *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985).

The court of appeals in this case, by conducting its own independent review of the evidentiary record of an arbitration proceeding and on that basis vacating an arbitration award, has placed in jeopardy the future usefulness of arbitration as an alternative dispute resolution device. The simple fact is that, if arbitration comes to be viewed as merely a "warm-up" for subsequent judicial proceedings, the advantages of arbitration will be lost (or at least severely diminished), and parties will be discouraged from using arbitration as a means of resolving their disputes. The SIA therefore seeks leave to file this brief in support of petitioners' request for review.

As the attached brief explains in greater detail, the court of appeals' new standard of review is an unprecedented departure from prior law, and conflicts with decisions of this Court and the decisions of other courts of appeals. With a membership that includes many frequent users of arbitration, the SIA has a strong interest in defending existing law on the narrow scope of judicial review of arbitration awards and in ensuring that that law is not changed, in the leading financial and commercial jurisdiction in the country, by a single court of appeals panel.

Accordingly, the SIA respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* in support of petitioners be granted.

Respectfully submitted,


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February 22, 1999

## QUESTION PRESENTED

Whether, given the strong federal policy favoring arbitration and the extremely narrow grounds for vacatur enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, the court of appeals erred in vacating an arbitration award under a new standard that permits the court to conduct its own independent review of the evidentiary record of the arbitration proceeding and on that basis to determine that the arbitrators manifestly disregarded *the evidence* in rendering the award.

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## BRIEF AMICUS CURIAE OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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### INTEREST OF THE AMICUS CURIAE

The Securities Industry Association ("SIA") is a trade association that represents more than 740 securities firms. SIA members—including investment banks, broker-dealers, and mutual fund companies—are active in all markets and in all phases of corporate and public finance. SIA members manage the accounts of more than 50 million investors directly and tens of millions investors indirectly through corporate, thrift, and pension plans.[1] The industry generates approximately $270 billion of revenues yearly in the U.S. economy and employs more than 380,000 individuals.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, contributed monetarily to the preparation or submission of this brief.

Many SIA member firms use arbitration to resolve a broad range of disputes, including disputes with employees, customers, and other securities firms. Many employees of SIA member firms agree to arbitrate employment disputes when they register with a self-regulatory organization, such as the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), whose rules require arbitration of many employment claims.[2] Other employees of SIA member firms agree to arbitrate employment disputes by entering into private arbitration agreements with their firms. Similarly, many customers of SIA member firms agree to arbitrate customer disputes. During the period 1994 to 1996, an average of 6,771 arbitration cases were filed each year involving securities firms. *See SRO Arbitration Figures,* Sec. Arb. Commentator, Oct. 1997 at 15 (con-

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[2] All securities industry employees who apply to become a registered representative with the NYSE or the NASD execute a Uniform Application for Securities Industry Registration or Transfer, commonly known as a "Form U-4." Although the NYSE and the NASD recently enacted rule changes under which registered employees are no longer required to arbitrate statutory discrimination claims *solely* on the basis of having signed a Form U-4, such claims will still be arbitrated before the NASD where the employee and employer have separately agreed, either before or after the dispute arose, to arbitrate such claims. (The NYSE also will continue to accept arbitration disputes involving statutory discrimination claims, but only under post-dispute arbitration agreements.) In addition, all other employment-related claims (*e.g.*, breach of contract, wrongful discharge, compensation, defamation, and other tort claims) are still subject to mandatory arbitration before the NASD and the NYSE by virtue of the Form U-4. NASD Code of Arbitration Procedure, Rule 10,201 (as amended by Order Granting Approval to Proposed Rule Changes Relating to the Arbitration of Employment Discrimination Claims, Exchange Act Release No. 40,109, 63 Fed. Reg. 35,299 (June 22, 1998)); NYSE Rules 347, 600 (as amended by Order Approving Proposed Rule Change by the NYSE Relating to Arbitration Rules, Exchange Act Release No. 40,858, 64 Fed. Reg. 1051 (Jan. 17, 1999)).

taining statistics regarding filings of arbitrations with seven major securities exchanges nationwide).

Given their reliance on arbitration as an effective and efficient means of resolving disputes in a wide variety of legal and factual contexts, SIA members have a strong interest in preserving the desirable features of arbitration and ensuring its viability as an alternative to court litigation. This interest is particularly acute in the Second Circuit, where the nation's financial center is located and the largest number of arbitration cases involving the securities industry are brought. Because the court of appeals' decision in this case threatens the utility of arbitration as a means of resolving disputes without the aid of the courts, the SIA submits this brief to urge the Court to grant the petition and address the detrimental implications of the Second Circuit's decision for the strong federal policy favoring arbitration and the finality of arbitration awards.

## REASONS FOR GRANTING THE PETITION

### THE SECOND CIRCUIT'S NEW STANDARD OF REVIEW CONFLICTS WITH DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER COURTS OF APPEALS, AND PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE

In vacating the arbitration award in this case, the court of appeals departed substantially from the narrow standards for judicial review established by Congress and historically recognized by this Court and the courts of appeals. The court of appeals overturned the result of a lengthy and vigorously contested arbitration on the basis of the court's own independent review of the evidentiary record of the arbitration proceeding. Concluding that the arbitrators manifestly disregarded *the evidence*, the court decided that the award could not stand. The court cited no precedent for this intrusive mode of judicial review, and independent research has identified none.

The novel ruling below has the potential to undermine the finality of *all* arbitration awards—not only in the Second Circuit, not only in the securities industry, and not only in employment cases. If left undisurbed, the court of appeals' decision likely will result in courts throughout the nation being asked by all manner of parties who are disappointed with the results of arbitration to review the evidentiary record from the arbitration proceeding to determine whether the arbitrator(s) manifestly disregarded *the evidence* in rendering the award. This will be true even for disputes involving basic common law principles (*e.g.*, contract disputes) or where small amounts are in controversy.

The court of appeals' new manifest disregard of *the evidence* standard thus has the potential of turning the judiciary into super-arbitrators, with courts sorting through hundreds of exhibits and thousands of pages of transcripts to respond to arguments that arbitrators incorrectly discerned the facts and weighed the evidence. Such an intrusive standard of review is clearly inconsistent with the strong federal policy favoring arbitration, and the interests of efficiency and finality that policy promotes.

The decision below conflicts with decisions of this Court and the decisions of other circuits. It injects a new and unpredictable element into judicial review of arbitration awards, a subject that previously had been reasonably well settled. Thousands of parties to arbitration proceedings (and hundreds of thousands, if not millions, of parties to arbitration agreements) are now faced with uncertainty concerning the finality of arbitration awards. Whether factual findings by arbitrators will remain final and not subject to review, or whether federal courts will conduct independent reviews of evidentiary records to determine whether the arbitrators manifestly disregarded *the evidence* is not a matter that should vary from circuit to circuit. The Federal Arbitration Act plainly contemplates a national standard, and the court of appeals' departure from

that standard in this case is sufficiently serious to warrant review by this Court.

### A. The Importance of Finality to the Strong Federal Policy Favoring Arbitration

When the Federal Arbitration Act ("FAA") was enacted in 1947, it severely limited the circumstances under which an arbitration award could be vacated. The specific narrow grounds for vacating an arbitration award under the FAA are: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct for refusing to hear pertinent evidence or failing to postpone the hearing for good cause; or (4) where the arbitrators exceeded their powers. 9 U.S.C. § 10.[3] In addition to the grounds for vacatur enumerated in the FAA, courts have held that an arbitration award can be vacated if the arbitrators "manifestly disregarded *the law*" in reaching their decision. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (emphasis added).

In accordance with the FAA and the strong federal policy favoring arbitration, courts have severely limited their review of arbitration awards and thus promoted the twin goals of arbitration, namely, achieving finality efficiently and effectively, and avoiding long and expensive litigation. *See Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

This Court and the lower federal courts have uniformly recognized that to serve these goals, arbitration awards must be subject only to the most narrow review. *See First Options of Chicago*, 514 U.S. at 942 ("the court

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[3] The FAA was originally enacted in 1925 as the United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), and was then reenacted and codified in 1947 as Title 9 of the United States Code. *See* Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947).

will set [an arbitration] decision aside only in very unusual circumstances[,]" namely, under § 10 of the FAA or under the "manifest disregard of the law" standard); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir.) ("Th[e] narrow standard of review [of arbitration awards] is necessary to preserve the benefits of arbitration, to wit, reduced delay and expense [and] to prevent arbitration from becoming a preliminary step to judicial resolution"), *cert. denied*, 119 S. Ct. 178 (1998); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("A restrictive standard of review is necessary to preserve these benefits [of arbitration] and to prevent arbitration from becoming a preliminary step to judicial resolution") (citation omitted); *Folkways Music Publishers*, 989 F.2d at 111 (narrow judicial review preserves the "twin goals of arbitration [—] settling disputes efficiently and avoiding long and expensive litigation"); *Alhambra Foundry Co. v. General Warehousemen's Union, Local 598*, 687 F.2d 287, 290 (9th Cir. 1982) (limited judicial review of arbitration awards is necessary to " 'obviate[] the enormous burden which would rest upon the judiciary if it should be required to settle, case by case, the endless number of . . . disputes . . . which inevitably occur between employers and employees' ") (quoting *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 755 (3d Cir. 1982)).

As the Fourth Circuit aptly recoginzed:

> Opening up arbitral awards to myriad challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."

*Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (quoting *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 900 F.2d 957, 960 (7th Cir. 1993)); *see* Jose A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, 70 N.Y. St. B.J. 22, 23 (Mar./Apr. 1998) ("Everyone understands that the many advantages of arbitration would quickly evaporate if arbitration proceedings were treated as mere pretrial hearings—warm-ups for the parties' day in court"); Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 Buff. L. Rev. 49, 85 (1997) ("A key component of arbitration's simplified procedures, the narrow scope of review preserves the economy of arbitration by supporting the finality of awards.").

The rationale behind this extremely limited standard of review lies in the strong federal policy favoring arbitration as an alternative to litigation. As this Court declared in 1854:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal . . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the [Court] in place of the [arbitrators] chosen by the parties, and would make an award the commencement, not the end, of litigation.

*Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854). More than 130 years later, this Court reaffirmed these principles and again made it clear that courts "play only a limited role when asked to review the decision of an arbitrator" and "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 38 (1987); *see also Gilmer v. Interstate/Johnson Lane*

*Corp.*, 500 U.S. 20, 26, 31 (1991) (by agreeing to arbitrate, the parties " 'trade[] the procedures *and opportunity for review* of the courtroom for the simplicity, informality, and expedition of arbitration' ") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added)); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("judicial review of an [arbitration] award is more limited than judicial review of a trial").

**B. The "Manifest Disregard of the Law" Standard Is "Severely Limited" and Did Not Provide a Basis for Vacatur in This Case**

Consistent with the FAA and the strong federal policy favoring arbitration, the reach of the manifest disregard of *the law* doctrine has been viewed as "severely limited," *see Government of India v. Cargill, Inc.*, 867 F.2d 130, 133 (2d Cir. 1989) (quotation omitted), and as requiring "more than error or misunderstaning with respect to the law." *See DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998) (quotation omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). To vacate an award for manifest disregard of the law, a reviewing court must find that the arbitrators consciously disregarded a well-defined, explicit, and clearly applicable rule of *law*, in that they were made aware of the rule but chose not to apply it. *See, e.g., DiRussa*, 121 F.3d at 821; *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) (award is in manifest disregard of the law if the arbitrator deliberately disregards what he knows to be the law); *Bobker*, 808 F.2d at 933-94.

Here, the court of appeals did not identify a single legal error made by the arbitration panel. It also did not identify any law or legal principle it believed the arbitrators misunderstood, misapplied, or disregarded—

manifestly or otherwise. Indeed, there was no disagreement between the parties regarding the applicable law in this case; the only dispute was over the facts. Pet. App. 15a-16a. Moreover, as more fully explained below, the court of appeals' opinion clearly demonstrates that its decision to vacate the award in this case was based entirely on the court's disagreement with the arbitrators' credibility determinations and weighing of *the evidence*, and not on any perceived refusal by the arbitrators to apply *the law*. *See United States v. Farragut*, 89 U.S. (22 Wall.) 406, 421 (1874) ("There is no evidence here of any misapprehension of the law governing [the case,] and it must obviously have been one mainly of fact, and the award, is therefore, conclusive.").

### C. The New Standard of Review Announced By The Second Circuit Conflicts With The Decisions of This Court and Those of Other Courts of Appeals

This Court and the lower federal courts have reviewed arbitration awards under the standards enumerated in the FAA and for manifest disregard of *the law* for many decades. In its decision below, however, the court of appeals enunciated a new standard of review that considers not only whether the arbitrators manifestly disregarded *the law*, but also whether they disregarded *the evidence*. Applying this new standard, the court conducted its own independent review of the record of the arbitration proceeding and determined that the award should be vacated because "the arbitrators here manifestly disregarded the law or the evidence or both." Pet. App. 16a, 17a.

As more fully explained in the petition, this case involved a challenge to a NASD arbitration award in which the panel rejected an age discrimination claim after 26 days of hearing during which 25 witnesses testified. The district court confirmed the award, holding that where, as here, the arbitration panel "was faced with a task of

evaluating conflicting witness testimony, . . . [d]etermining the credibility of conflicting witnesses is a key component of an arbitration panel's duty, and . . . [t]his Court's role is not to second-guess the fact-finding done by the [arbitrators]." Pet. App. 33a.

The court of appeals ignored these conclusions. The court conducted its own review of the evidentiary record of the arbitration proceeding and found that Halligan had presented what the court variously described as "strong," "very strong," "powerful," and "overwhelming" evidence to support his claims. Pet. App. 4a, 15a, 16a. The court then concluded that "[i]n view of the *strong evidence* that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that [the panel] ignored the law or the evidence or both." Pet. App. 16a (emphasis added).

Although the court of appeals referred, here and elsewhere in its opinion, to manifest disregard of "the law or the evidence or both," the opinion as a whole makes clear that the court's decision to vacate the award was based entirely on the court's disagreement with the arbitrators' credibility determinations and weighing of *the evidence*, and not on any perceived refusal by the arbitrators to apply *the law*. No legal error was identified, and the court did not identify any law or legal principle that it believed the arbitrators disregarded.

Moreover, the court's decision was not based on a finding that there was no factual support for the award. In that regard, the court of appeals observed that petitioner "submitted various memoranda . . . and offered testimony by various witnesses," including the testimony of witnesses who denied making the allegedly discriminatory statements attributed to them by Halligan, and the testimony of Halligan's supervisor that Halligan had agreed to retire. Pet. App. 5a-7a. Thus, as the district

court correctly observed, "there is support for [petitioners'] argument in the record, . . . [and] there is factual support as well as legal support for the [Arbitration] Panel's ultimate conclusion". Pet. App. 33a.

The court of appeals focused, however, on what it perceived as the strength of the evidence supporting Halligan's claims (Pet. App. 15a-16a), and what it perceived as the lack of credibility of Piper's witnesses. For example, the court referred to the testimony of petitioner's witnesses as "occasionally inconsistent and ambiguous," and as having been "contradicted . . . by other Piper witnesses." Pet. App. 5a, 7a. Even more revealing is the court's statement that if the arbitrators had explained in their award that they had "credited Piper's witnesses rather than Halligan's," such an explanation "on this record . . . would have been extremely hard to accept[.]" Pet. App. 17a. Thus, the court's decision was based on its own independent examination of the arbitration record with little, if any, attention to the presence or sufficiency of evidence supporting the award, and little, if any, deference to the credibility determinations and weighing of the evidence by the arbitrators.

The new standard of review announced by the court of appeals in this case conflicts with the decisions of this Court and the courts of appeals, which have uniformly rejected invitations to review the merits of an award or to vacate an award based upon allegedly erroneous *findings of fact. See, e.g., Misco,* 484 U.S. at 36, 38-39, 44-45 ("courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact" and "a court may not reject [an arbitrator's fact] findings simply because it disagrees with them" or views them as improvident); *Homestake Mining Co. v. United Steelworkers of Am.,* 153 F.3d 678, 680 (8th Cir. 1998) ("We will not reconsider the merits of an award even though the parties may allege that the award rests on errors of fact") (quotation omitted); *Loughridge v. Allen,* No. 93-5099, 1994

WL 258719, at * 1 (10th Cir. 1994) (unpublished opinion) (arbitration awards are not open to review on the merits and, in reviewing an arbitration award, "we do not weigh the credibility of witnesses, assign weight to their testimony, or determine facts"); *Shelby County Healthcare Corp. v. AFSCME, Local 1733,* 967 F.2d 1091, 1094 (6th Cir. 1992) ("courts are not permitted to consider the merits of an arbitration award even if the parties allege that the award rests on errors of fact"); *Advest, Inc. v. McCarthy,* 914 F.2d 6, 8, 10 n.6 (1st Cir. 1990) ("even where [a factual] error [by an arbitrator] is painfully clear, courts are not authorized to reconsider the merits of arbitration awards"; court resisted temptation to review arbitration award as being "unfounded in reason and fact") (citation omitted); *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union,* 831 F.2d 72, 74 (5th Cir. 1987) ("A court may not review the merits of an [arbitration] award—it must accept the facts found by the arbitrator"); *Amalgamated Butcher Workmen Local Union No. 641 v. Capital Packing Co.,* 413 F.2d 668, 672 (10th Cir. 1969) ("It is settled law that an award of an arbitrator . . . is not open to review on the merits . . . [a]nd it matters not that this court, if the merits of the award were open to review, might differ with the arbitrator with respect to his findings of fact") (citations omitted).

This Court and other courts of appeals similarly have held that factual findings in arbitration awards are conclusive and that a court must enforce such an award even if the court disagrees with the arbitrator's assessment and weighing of the evidence. *Farragut,* 89 U.S. (22 Wall.) at 419-21 ("Where the award finds facts it is conclusive[;] where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be

distinctly shown, the parties must abide by the award"); *Remmey*, 32 F.3d at 150 (no manifest disregard where "the arbitrators had substantial conflicting testimony which could support a decision for either of the parties . . . [and] the arbitrators may well have chosen to credit evidence presented by defendants"); *National Wrecking Co.*, 990 F.2d at 961 (courts must enforce awards "even in the face of erroneous findings of fact") (citing *Northrop Corp. v. Triad Int'l Marketing S.A.*, 811 F.2d 1265, 1268-69 (9th Cir. 1987)); *News Am. Publications, Inc. Daily Racing Forum Div. v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990) ("An arbitral award may not be overturned for factual error, or because the court disagrees with the arbitrator's assessment of the credibility of witnesses, or the weight the arbitrator has given to testimony") (citations omitted).

The Second Circuit previously had adhered to this rule as well. *See Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985) ("the fact that an arbitrator erroneously decided the facts" is "not a ground for vacating an arbitrator's award") (citation omitted); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974) (rejecting a request that the court review the record of an arbitration proceeding for errors of fact, the court observed that this is "a role which we have emphatically declined to assume in the past and reject once again" because "extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings") (citations omitted); *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) ("it is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law or fact.").

In this case, however, the court of appeals departed from decades of precedent and announced a new standard of review that conflicts with all relevant decisions of this

Court and the courts of appeals. The court cited no authority for upsetting the arbitration award based on the court's own independent review of the evidentiary record, and the SIA is aware of no such support. The decision below jeopardizes the finality of all arbitration awards and threatens the utility of arbitration as an alternative to litigation. As governing law in New York, the nation's leading financial center, the decision has the potential to create enormous mischief if it is not promptly reviewed and rectified.

### D. The Absence of a Written Explanation for the Arbitration Award Does Not Support the Court of Appeals' Decision

In deciding to vacate the arbitration award in this case, the court of appeals relied in part on the fact that the arbitrators did not explain their rationale in the award. Pet. App. 16a-17a. But this Court has specifically held that arbitrators are not required to state their rationale. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (ambiguity in an opinion accompanying the award, which arguably permits an inference that the arbitrator exceeded his authority, is not a reason to refuse enforcement of the award because arbitrators have no obligation to give reasons for an award); *see Gilmer*, 500 U.S. at 31-32 (rejecting argument that absence of a written rationale precludes effective appellate review). The court of appeals' reliance on the absence of a written rationale is inconsistent with the decisions of other courts of appeals, as well as with its own prior decisions. *See, e.g., Loughridge*, 1994 WL 258719, at *1 (arbitrators are not required to explain the reasons for their award); *Eljer*, 14 F.3d at 1254 (same); *Folkways Music Publishers, Inc.*, 989 F.2d at 112 ("[A] lack of accompanying justification for the award will not render the award ambiguous or in manifest disregard of the law. Arbitrators need not give reasons for their determinations."); *see also Willemijn Houdstermaatschappij, BV v.*

*Standard Microsystems Corp.*, 103 F.2d 9, 13 (2d Cir. 1997) (in the absence of a written opinion, "we must confirm the arbitrators' decision 'if a ground for [it] can be inferred from the facts of the case' . . . even if the ground . . . is based on an error of fact or an error of law"); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972) (there is no requirement that arbitrators state the reasons for their decision).

Unless the court of appeals' decision here is reversed, litigants seeking to vacate arbitration awards throughout the country can be expected to argue, on the authority of the decision below, that arbitrators' failure to explain their rationale can be taken into consideration by a reviewing court in deciding whether the arbitrators manifestly disregarded the law (or, under the court of appeals' new standard, the evidence). Arbitration awards, otherwise unassailable, will be called into question merely because arbitrators have not explained their decisions. Arbitrators, seeking to avoid such attacks, will be impelled to write more, with the inevitable attendant delay and expense. And, of course, any explanation that arbitrators do give will itself be closely parsed by the losing party, in an effort to identify possible grounds for undermining the finality of the award. All of this will move arbitration closer to litigation, will decrease the incentive for parties to choose arbitration in the first place, and will result in more cases being filed in the courts rather than resolved through private proceedings.

## CONCLUSION

The decision below is of substantial concern to all participants in arbitration and arbitration agreements. By expanding the scope of judicial review of arbitration awards to include a review of the evidentiary record for manifest disregard of *the evidence*, the court of appeals has undermined the twin goals underlying the strong federal policy favoring arbitration—finality and cost re-

duction—and thereby created a precedent with significant legal and practical consequences for parties and courts nationwide.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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